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No. 98-1304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

EDWARD M. STEPHENS, M.D., JOSÈ A. YARYURA-TOBIAL, M.D., JUDITH GREEN, PH.D., AGNES NEZIROGLU, PH.D., ONA ROBINSON, PH.D., AGNES WOHL, C.S.W., AND THE ON-STEP INSTITUTE FOR MENTAL HEALTH RESEARCH, INC., individually and on behalf of all others similarly situated,

Petitioners,

v.

CMG HEALTH, FHC OPTIONS, INC., FOUNDATION HEALTH PSYCHCARE SERVICES, INC., GREEN SPRING HEALTH SERVICES, INC., HUMAN AFFAIRS INTERNATIONAL, INC., MERIT BEHAVIORAL CARE CORP., MCC BEHAVIORAL CARE INC., UNITED BEHAVIORAL SYSTEM, INC., AND VALUE BEHAVIORAL HEALTH, INC.,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1) Whether a District Court may dismiss a complaint asserting an antitrust conspiracy where the complaint alleges no facts showing either collusion among the defendants or antitrust injury, on the grounds that it does not contain the "short and plain statement of the claim showing that the pleader is entitled to relief" mandated by Federal Rule of Civil Procedure 8(a)(2).

2) Whether a plaintiff who fails to survive a Rule 12(b)(6) motion has an absolute right to file an amended complaint even though the plaintiff never filed or proffered an amended complaint, and the district court properly found that the filing of an amended complaint would be futile and prejudicial.

RULE 29.6 LISTINGS

Respondent (defendant and appellee below) MCC Behavioral Care, Inc. is a wholly-owned subsidiary of Connecticut General Corporation, which is a wholly-owned subsidiary of CIGNA Holdings, Inc., which is a wholly-owned subsidiary of CIGNA Corporation, a publicly-held corporation. MCC Behavioral Care, Inc. has no nonwholly owned subsidiaries.

Respondents (defendants and appellees below) CMG Health, Inc., Green Spring Health Services, Inc., Human Affairs International, Inc., and Merit Behavioral Care Corp. are direct and indirect wholly owned subsidiaries of Magellan Health Services, Inc. ("Magellan"), a publicly-held corporation. Respondent CMG Health, Inc. is a direct wholly owned subsidiary of Respondent Merit Behavioral Care Corp., which is wholly owned by MBCH, Inc., a direct wholly owned subsidiary of Magellan. Respondent Green Spring Health Services, Inc. and Respondent Human Affairs International, Inc. are each direct wholly owned subsidiaries of Magellan, and have no nonwholly owned direct subsidiaries. Nonwholly owned direct subsidiaries of CMG Health, Inc. are: Choice Behavioral Health Partnership; Maryland Health Partners, LLC; and Montana Community Partners, Inc. Nonwholly owned direct subsidiaries of Merit Behavioral Care Corp. are: BCOV-GP, Inc.; Continuum Behavioral Care, LLC; EHMC-MBC of New York, LLC; and MBC of Tennessee, LLC.

Respondent (defendant and appellee below) FHC Options, Inc. changed its name to OPTIONS Health Care, Inc. Respondent (defendant and appellee below) Value Behavioral Health, Inc. merged with and into OPTIONS Health Care, Inc., and the surviving company was renamed ValueOptions, Inc. The parent corporation of ValueOptions, Inc. is FHC Health Systems, Inc. ValueOptions, Inc. has no nonwholly owned subsidiary corporations.

RULE 29.6 LISTINGS (cont'd)

Respondent (defendant and appellee below) Foundation Health Psychcare Services, Inc. has merged with and into Managed Health Network, Inc., and has the following parent corporations: Foundation Health Corporation and Foundation Health Systems, Inc.

Respondent (defendant and appellee below) United Behavioral Services, Inc. is a wholly-owned subsidiary of United Behavioral Health, which is a wholly-owned subsidiary of United HealthCare Services, Inc., which in turn is a wholly-owned subsidiary of United HealthCare Corporation. United Behavioral Systems, Inc. does not have any non-wholly owned subsidiaries.

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OPINIONS BELOW

The Summary Order of the court of appeals (Pet. App. 1a-4a) is unreported. The decision of the district court (Pet. App. 5a-7a; J.A. A-100)[1] is unreported. The Report and Recommendation of the magistrate judge (Pet. App. 8a-43a) is also unreported.

JURISDICTION

The mandate of the court of appeals was entered on December 7, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The plaintiffs in this case are mental healthcare providers who believe that managed care health plans should pay the plaintiffs more money than they do. The five judges who considered the complaint below quickly and unanimously recognized that it suffered from two fatal flaws. First, although the claim asserted was a conspiracy under Section One of the Sherman Act, no fact was alleged to allow an inference that the conduct complained of was undertaken collusively — as a result of an actual agreement among the defendants — rather than for each defendant's own independent business reasons. The second flaw was the failure to allege any fact showing antitrust injury — that is, harm flowing from a marketwide reduction in competition — as opposed to the simple assertion that defendants (and ultimately consumers) should pay more for the plaintiffs' services. These flaws were sufficiently obvious that the Second Circuit Court of Appeals summarily affirmed the dismissal below in a one-half page, unpublished decision noting that a plaintiff may not institute a massive antitrust class action based solely on "'a bare bones statement of conspiracy

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[1] References to the transcript of the district court hearing will cite the Joint Appendix ("J.A. A-__.") submitted to the Second Circuit.

or of injury under the antitrust laws without any supporting facts.'" Pet. App. 3a.

Neither below nor in this Court have plaintiffs attempted to point to any fact in the complaint that would cure these deficiencies. As a result, plaintiffs must attempt to obtain review in this Court by framing questions presented that, even if answered as plaintiffs would like, would still result in affirmance of the decision below. The first question is a truism; plaintiffs would have this court hold that Rule 8(a)(2) means what it says. But that will not help the plaintiffs here unless, as they argued to the Court of Appeals, this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), silently overruled the unanimous view of all circuits that conclusory pleading is insufficient to state a claim on which relief may be granted. As shown below, that argument finds no support in *Leatherman*, and is flatly contradicted by other decisions of this Court affirming the dismissal of antitrust complaints under Rule 12(b)(6).

The second question presented by plaintiffs — claiming an "absolute right" to file an amended complaint whenever a Rule 12(b)(6) motion is lost — is a question that was neither argued nor considered in the courts below, and hence classically inappropriate for review by this Court. Beyond that, plaintiffs' assertion of an "absolute right" under Rule 15 is difficult to comprehend when plaintiffs failed to invoke the rule either by filing a motion or by tendering an amended complaint (despite numerous opportunities to do so). Notwithstanding that failure, the district court still inquired at length as to the new allegations plaintiffs would add if permitted and concluded that such an amendment would be both futile and prejudicial to defendants — an exercise of discretion not challenged by plaintiffs in this petition. Thus, even if this Court were inclined to "review" an issue neither raised nor ruled upon below,

plaintiffs' attempt to manufacture a split in the circuits under Rule 15 would fail; no circuit court has granted or would grant an "absolute" right to replead under the circum-stances presented here.

BACKGROUND

Plaintiffs, purporting to represent a nationwide class of mental health care providers (Pet. App. 50a-53a), claim that defendants, whom plaintiffs refer to as "managed mental healthcare organizations" (Pet. App. 54a), agreed to lower the fees that they pay plaintiffs for their services. Pet. App. 56a. Plaintiffs assert that this purported agreement constitutes an unlawful restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). Pet. App. 55a.

Defendants moved to dismiss the Complaint, arguing that plaintiffs had not sufficiently alleged either the existence of a conspiracy or a resulting antitrust injury. The motion was referred to a magistrate judge for a report and recommendation. Plaintiffs chose not to file an amended complaint. Instead, they filed an opposing brief, in which they requested leave to replead should the motion to dismiss be granted without stating what additional allegations they might include in an amended complaint. While the motion to dismiss was pending, plaintiffs conducted limited discovery under the supervision of the magistrate judge.

The magistrate judge recommended that the Complaint be dismissed. To show a violation of Section 1 of the Sherman Act, a plaintiff must show that defendants entered into a "'contract, combination . . . or conspiracy.'" *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); 15 U.S.C. § 1. Regarding this element, the magistrate judge wrote:

> The complaint contains nothing more than generalized, conclusory allegations that defendants "fixed, lowered,

> maintained and stabilized" fees. . . . In short, there are no concrete assertions that any defendant is acting similarly to any other.

Pet. App. 21a-22a. In order to have standing to complain of a violation of the Sherman Act, every plaintiff, whether or not invoking a *per se* theory of liability, must establish antitrust injury. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 344 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 (1986). Regarding this element, the magistrate judge found that the Complaint failed to allege harm to competition and the market, and therefore failed to allege antitrust injury. "Plaintiffs have failed to allege any harm other than the thwarting of their desire to charge more for their services." Pet. App. 34a. Noting that plaintiffs proffered neither an amended complaint nor "any factual allegations they failed to include in the current complaint," the magistrate judge found that the request to amend the Complaint should be denied as futile. Pet. App. 40a-41a.

Plaintiffs then urged that the district court should reject the magistrate judge's Report and Recommendation, and there was additional briefing in the district court. Plaintiffs again chose not to proffer a proposed amended complaint. At oral argument, the district court nevertheless gave plaintiffs every opportunity to proffer additional facts that plaintiffs would allege if they were given the opportunity to amend. Thus, she directed, at the very beginning of the argument,

> . . . what I want [plaintiffs] to focus on in oral argument is what facts you believe indicate that defendants entered into an anticompetitive agreement here. . . . I think defense counsel rightly point out that you have failed on a number of opportunities to state those facts. So here is your last opportunity before I accept, if that is what I am going to do, the magistrate judge's report and recommendation.

J.A. A-63. Nonetheless, when asked to describe the facts at his disposal, plaintiffs' counsel admitted, "I didn't come here prepared to address these things and I am talking off the top of my head right now." *Id.* at A-86—A-87. When the court requested that counsel show her the most important documents buttressing his case, he stated that he did not have them with him. *Id.* at A-66, A-70. When asked to produce them, he claimed that no one was at his office to find them. *Id.* at A-71—A-72. When he claimed that there were damaging statements from certain documents quoted in his Objections to the Report, the district court observed that the partial "quotations" in the Objections did not contain citations to any source. *Id.* at A-85—A-86. On inquiry, plaintiffs were unable to identify the documents. *Id.* at A-86. Rather than setting out how they would allege antitrust injury, plaintiffs instead admitted that they had identified neither relevant markets nor barriers to entry. *Id.* at A-93, A-94.

At the end of the hearing, the district court stated, "I do believe that any attempt at amendment would be futile. From what I have heard so far, I do not believe that the facts at plaintiffs' counsel's disposal are sufficient to rescue the complaint." J.A. A-100. In a written order, the district court confirmed her ruling, and elaborated on the reasons why allowing leave to amend the complaint would be both futile and prejudicial. Pet. App., 5a-7a.

Plaintiffs appealed to the Second Circuit. The parties again briefed the issues, and participated in oral argument. The panel unanimously affirmed. In an unpublished Summary Order, the panel concluded that the Complaint should be dismissed because "'a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal.'" Pet. App. 3a. The panel also held that the district court's determination not to allow repleading was not an abuse of discretion because "[a]lthough questioned extensively by the

district judge as to what amendments would be made to an amended pleading, plaintiffs' counsel failed to supply any satisfactory proposal that would cure the deficiency." *Id.*

ARGUMENT

I. THE COURT SHOULD DENY CERTIORARI ON THE RULE 8(a) ISSUE.

A. The Decisions Below Reflect A Straightforward Application Of Rule 8(a).

Plaintiffs, quoting the language of Rule 8(a), ask this Court to determine "[w]hether the Federal Rules of Civil Procedure require more to be pleaded than the short and plain statement of the claim showing plaintiffs are entitled to relief in an antitrust action." Pet. i. And, of course, the answer is no. The unpublished opinions entered below applied this standard, and there is no conflict of authority on this question. There is therefore no issue of law for this Court to review, merely the application of the well-known, and properly stated, standard for dismissal as applied to the specific factual allegations in the Complaint at hand.

The decisions below explicitly state that they are applying the ordinary pleading standard set out in Rule 8(a). The magistrate judge's discussion of the appropriate legal standard (Pet. App. 11a-13a) cites the Supreme Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1957), and the Second Circuit cases that applied it. She held:

> It is clear that this standard applies to antitrust cases, and that antitrust plaintiffs are not required to plead with any additional specificity beyond that required by Fed. R. Civ. P. 8(a).

Id. at 12a. The magistrate judge then carefully sifted through the allegations in the Complaint, determined that the Complaint

failed to sufficiently allege either a conspiracy among the defendants or resulting antitrust injury, and accordingly recommended dismissal. The district court adopted the Report and Recommendation (Pet. App., 5a), finding that the magistrate judge "correctly stated the law and correctly applied the law to the facts that were before her." J.A. A-96.

The Second Circuit considered, and rejected, plaintiffs' argument that the district court "inappropriately appl[ied] a heightened pleading standard." Pet. App., 3a. The Second Circuit concluded that "the district court did not hold plaintiffs to a heightened pleading standard, but rather correctly applied Fed. R. Civ. P. 8(a), 12 (b)(6), and associated caselaw." *Id.*

There is no occasion for this Court to determine whether the lower courts properly applied Rule 8(a). "A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. And here, in any event, Rule 8(a) was properly applied below.

B. There Is No Conflict In The Circuits Or With This Court Concerning The Proper Pleading Standards.

Plaintiffs argue that one of the cases the judges below relied on, *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98 (2d Cir. 1972), is in conflict with the decisions of this Court and the decisions of the Seventh and Third Circuits.[2] It is not. In *Heart Disease Research*, *id.* at 100, and again in the decision below, Pet. App. 3a, the Second Circuit held that a "bare bones" assertion of an antitrust

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[2] Pet. 12, *citing Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993); *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994); *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3d Cir. 1995).

violation can be dismissed if made "without any supporting facts." It therefore appears to be plaintiffs' contention that the Supreme Court, and certain circuit courts, have held that the existence of an antitrust claim may be successfully pleaded "without any supporting facts."

The decisions below holding that antitrust claims may not be pleaded "without any supporting facts" are consistent with this Court's decision to dismiss an antitrust complaint in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). This Court wrote that "a district court must retain the power to insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* at 528 n.17 (discussing "the rule of *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)"). Although a court should assume that a plaintiff can prove the facts actually alleged, "[i]t is not, however, proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." 495 U.S. at 526. Relying in part on the *absence* of certain factual claims (*id.* at 542), the Supreme Court ruled that "based on the allegations of this complaint, the District Court was correct in concluding that the [plaintiff] is not a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act." *Id.* at 545-46; *compare Nynex Corp. v. Discon, Inc.*, 119 S.Ct. 493 (1998) (dismissing allegations of *per se* violations of the Sherman Act).

No authority permits antitrust claims to be pleaded "without any supporting facts." Rule 8(a), for example, demands that the statement of the claim "show[ ] that the pleader is entitled to relief." Nor, as plaintiffs assert, (Pet. 11, 13-14) did *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), "implicitly over-rule[ ]" *Heart Disease Research*. *Leatherman*, a civil rights

case, never cited *Heart Disease Research* or any other antitrust case. Rather, *Leatherman* considered the express adoption by the Fifth Circuit of a judge-made rule that would require greater specificity than mandated by Rule 8(a)(2) in cases where public officials named as defendants had a potential claim of immunity from suit. While striking down the notion that a "heightened pleading standard" is permissible for claims other than those listed in Rule 9(b), the *Leatherman* court did not analyze the requirements of Rule 8(a) other than to restate the "notice pleading" rule of *Conley v. Gibson*, 355 U.S. at 47. That rule, however, does not reduce the pleading requirement to nothing; a complaint must give fair notice not just of what the claim is, but also "'the grounds upon which it rests.'" *Leatherman*, 507 U.S. at 168, *quoting Conley*, 355 U.S. at 47.

There likewise is no conflict between the Second Circuit's determination in *Heart Disease Research* and the Seventh Circuit's decision in *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994). *Hammes* holds that the jurisdictional predicate of antitrust cases, effect on interstate commerce, need not be pleaded in detail. *Hammes*, 33 F.3d at 778. But unlike the allegations here involved, the allegations in question in *Hammes* contained supporting facts. The *Hammes* complaint alleged that the defendant sold "franchises in several states," and that the plaintiff franchisee "mailed substantial fees" to defendant, "contributed money to [defendant's] national advertising," and "'purchased equipment and inventory'" from defendant. *Id.*[3] Nor, as plaintiffs imply, did the Third Circuit in *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3d Cir. 1995), abandon the need to plead the necessary elements of an antitrust claim, including antitrust

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[3] The *Hammes* court also stressed that pleading details regarding effect on interstate commerce was unnecessary because "the number of cases that fail at that threshold has become minuscule." 33 F.3d at 778.

injury. *See City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 265 (3d Cir. 1998) (affirming Rule 12(b)(6) dismissal of complaint for failure to allege antitrust injury); *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405, 417-18 (3d Cir.) (same), *cert. denied*, 118 S.Ct. 435 (1997).

Accordingly, there is no conflict in the circuits concerning the appropriate pleading standard. The courts below dismissed the Complaint because it pleaded less than what is mandated by Rule 8(a), which rule is uniformly applied by this Court and every circuit. Plaintiffs present no issue that merits further review in this Court.

II. THE COURT SHOULD DENY CERTIORARI ON THE PLAINTIFFS' ASSERTED "ABSOLUTE RIGHT" TO REPLEAD

A. Plaintiffs Did Not Raise This Question Below

Plaintiffs would have this Court declare that Federal Rule of Civil Procedure 15(a) grants plaintiffs an "absolute right to amend a complaint at least once where it has been dismissed as insufficiently particular. . . ." Pet. i. No opinion below focused on this question, (*e.g.* Pet. App., 1a-4a), for the simple reason that plaintiffs never presented this question to any court other than this one. Plaintiffs never even cited Rule 15 to any court below. To be sure, plaintiffs unsuccessfully disputed the district court's determination that leave to replead would be futile and prejudicial (Pet. App. 5a-7a). But nowhere in the entire record did plaintiffs even hint that repleading was a question of "absolute right," and not a matter committed to the discretion of the district court. On the contrary, plaintiffs correctly informed the Second Circuit that "The District

Court's refusal to grant leave to file an amended complaint is reviewed for an abuse of discretion." App. Br. at 17.[4]

This Court's "normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals." *EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (per curiam) (dismissing writ of certiorari as improvidently granted); *accord Auer v. Robbins*, 519 U.S. 452, 464 (1997). To do otherwise would require the Court to embark on a fresh legal analysis entirely uninformed by the consideration or resolution of this question in the courts below. There is no reason to depart from the Court's normal practice in this case.

B. No Circuit Grants An Absolute Right To Submit A Futile Amended Complaint After The Dismissal Of The Case.

Plaintiffs claim that they were denied "their absolute right to amend" (Pet. 19), and that it was error for the district court to "apply[ ] concepts such as 'prejudice' and 'futility' to the determination of petitioners' request" to amend. Pet. 20. Plaintiffs concede that the district court's decision was "in keeping with Second Circuit requirements." *Id.*; *accord* Pet. at 5.

Plaintiffs claim, however, to have identified a circuit split regarding the right to replead between the court below and Second Circuit precedent, on the one hand, and the Ninth Circuit, on the other. Pet. 20, *citing United States ex rel. Richard Saaf v. Lehman Brothers*, 123 F.3d 1307, 1308 (9th Cir. 1997) ("Neither the filing nor granting of . . . a motion [to dismiss] before answer terminates the right to amend"). Plaintiffs are wrong. No circuit grants an "absolute right to amend," since in all circuits the futility of amendment bars

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[4] The relevant excerpt from this brief is appended to this Opposition.

repleading. *See Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) (repleading should not be permitted where the district court "determines that the pleading could not possibly be cured by the allegation of other facts"); *Cook, Perkiss and Liehe, Inc. v. Northern California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

The district court here carefully reviewed the Complaint, the parties' briefs, and the magistrate judge's Report and Recommendation, and at oral argument directed plaintiffs to state what additional facts they could plead. J.A. A-63. Since plaintiffs never proffered an amended complaint, and since the district court's inquiry revealed no facts at plaintiffs' disposal that could cure the flaws in the original complaint, the Second Circuit was correct to conclude that "[t]he district court was within its discretion in finding that granting permission to amend would be both futile and prejudicial." Pet. App., 3a-4a. Neither the Ninth Circuit nor any other circuit requires district courts to permit the filing of an amended complaint where such an act has been determined to be futile. *See Cook, Perkiss and Liehe*, 911 F.2d at 247 (9th Cir.) (affirming refusal to permit repleading where "the district court determined that the pleading could not be cured by the allegation of other facts").

Furthermore, some Ninth Circuit panels have held that the right to amend a complaint does not survive an adverse judgment. "Where a final judgment is entered following dismissal of an action, the plaintiff no longer has the right to amend the complaint as a matter of course. . . . Under these circumstances, the appellants' amendment could be made only by leave of the court." *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987), *quoted by Lindauer v. Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996); *see Foman v. Davis*, 371 U.S. 178, 179, 182 (1962) (plaintiff attempted to amend the complaint after a motion to dismiss was granted; leave to amend "is within the discretion of the District Court," which may consider such

issues as prejudice and futility). Although plaintiffs early on asked for leave to amend in the event the motion to dismiss were granted, plaintiffs never attempted to file or proffer an amended complaint. As the Ninth Circuit has noted, "the district court's discretion is particularly broad where the plaintiff has bypassed other opportunities to amend." *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 677 (9th Cir. 1993); *accord Confederate Memorial Ass'n, Inc. v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993) ("a bare request in an opposition to a motion to dismiss . . . does not constitute a motion within the contemplation of Rule 15(a)"). After a district court enters judgment, in either the Second or Ninth Circuits, "a motion to amend the complaint can only be entertained if the judgment is first reopened under a motion brought under Rule 59 or 60," a motion that plaintiffs never brought. *Lindauer*, 91 F.3d at 1357. It thus appears that each determination as to whether a plaintiff should be permitted to replead depends on the unique facts presented in that case. Any tensions that may exist between the Ninth Circuit decisions in *Lindauer*, *Westlands Water*, and *Jarvis* and the Ninth Circuit decision cited by plaintiffs, (*see Saaf*, 123 F.3d at 1308) should be addressed in the first instance by that circuit court.

Accordingly, petitioners' eleventh hour assertion of an absolute right to amend does not merit this Court's attention.

CONCLUSION

For the reasons stated above, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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March 18, 1999

APPENDIX

[filed July 7, 1998]

APPELLANTS' BRIEF ON APPEAL
Filed in Case No. 98-7750
before the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[17] ***

I. The Standard for Reviewing a District Court's Dismissal Pursuant to F.R.C.P. 12(b)(6).

This Court's review of the District Court's dismissal, like the District Court's review of the Magistrate Judge's Report, is de novo in that an independent determination of the controversy is required and no deference to any prior resolution would be appropriate. *E.g., De Jesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65, 69 (2d Cir. 1996) (reviewing this Court's role); *Moore v. Scully*, 956 F. Supp. 1139, 1143 (S.D.N.Y. 1997) (reviewing the District Court's role pursuant to F.R.C.P. 72(b)).

This District Court's refusal to grant leave to file an amended complaint is reviewed for an abuse of discretion. *E.g., De Jesus*, 87 F.3d at 71.

II. The Standard for Deciding a Motion to Dismiss.

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